

ARKANSAS COURT OF APPEALS

DIVISION I
No. CA08-202

LINDA LOVELL

APPELLANT

V.

CENTRAL ARKANSAS
DEVELOPMENT COUNCIL

APPELLEE

Opinion Delivered DECEMBER 3, 2008

APPEAL FROM THE SALINE
COUNTY CIRCUIT COURT,
[NO. CV2006-476-2]

HONORABLE GARY M. ARNOLD,
JUDGE

AFFIRMED

ROBERT J. GLADWIN, Judge

Linda Lovell appeals the October 25, 2007 judgment entered against her in Saline County Circuit Court. She contends that the trial court had insufficient evidence before it to grant judgment based upon the counterclaim filed by appellee Central Arkansas Development Council (CADC). She further claims that the trial court erred in failing to sustain her complaint for breach of contract. We affirm.

Lovell filed her complaint for breach of contract on March 2, 2006, against CADC and Rick Holland, the mayor of Benton, who authorized the contract with Lovell.¹ She sought payment for her work performed under the contract, which was to resurface kitchen space

¹This case was originally filed in Saline County District Court, but transferred by order of May 17, 2006, to Saline County Circuit Court upon motion by CADC that the basis of its counterclaim exceeded the jurisdictional limits of district court. Lovell nonsuited as to Rick Holland by order filed April 24, 2006, in Saline County District Court.

at the Benton Senior Citizens Center. CADC filed a counterclaim against Lovell alleging that the contract called for a “like new” concrete floor at the Center and that Lovell did not provide it. The total contract price was \$6,659.50, and CADC acknowledged that final payment of \$2,219.83 had not been paid to Lovell because the floor was not “like new.” CADC alleged that they gave Lovell an opportunity to cure the defective performance, but Lovell demanded more money. CADC was forced to hire a new contractor to remove the floor applied by Lovell and apply a new finish. Further, CADC had to repaint the kitchen walls that Lovell had painted, as the paint used by Lovell was not in compliance with Arkansas Department of Health regulations. CADC sought judgment for Lovell’s breach of contract in using the incorrect type paint for the kitchen and failing to perform satisfactory work in resurfacing the floor.

After a bench trial, the circuit court granted judgment to CADC. The judgment states:

After hearing all evidence in this matter and considering the applicable law, the Court finds that the Plaintiff is not entitled to damages on the Complaint. However, the Defendant/Counter Plaintiff, Central Arkansas Development Council, has demonstrated to this Court that it is entitled to Judgment against the Plaintiff/Counter Defendant in the amount of \$4,439.66 in order to be made whole under the contract between it and the Plaintiff. The Counter Plaintiff is also awarded attorney fees in the amount of \$750.00 plus Court costs in the amount of \$160.00, for a total Judgment of \$5,349.66.

Lovell filed a timely notice of appeal, and this appeal followed.

The standard that we apply when we review a judgment entered by a circuit court after a bench trial is well established. We do not reverse such a judgment unless we determine that the circuit court erred as a matter of law or we decide that its findings were clearly against

the preponderance of the evidence. *Heartland Community Bank v. Holt*, 68 Ark. App. 30, 3 S.W.3d 694 (1999). Disputed facts and determination of the credibility of witnesses are within the province of the circuit court, sitting as trier of fact. *Id.*

Lovell contends that the trial court erred in sustaining CADC's counterclaim for breach of contract. She argues that she properly performed the labor as per the terms of the contract and thus could not have been in breach. The circuit court determined that Lovell failed to properly resurface the Center's floor and interior walls, which necessitated CADC having to spend money to get the work done properly.

Lovell points out that she testified that the terms of the contract provided that she was to use ARDEX CD as the floor-finishing material. She claimed that she followed the specifications to the letter concerning application of the product. CADC's witness, Mr. Victor Wheatley, stated that ARDEX could be applied to the floor. Lovell claims that Wheatley's objection to the floor seemed to be the floor's texture. Further, Lovell contends that there was no specific regulation or policy prohibiting the type of texture she applied to the interior walls. She contends that any dispute as to the finish or texture of the floor or walls would not have been a material breach of contract entitling CADC to an award of monetary damages because the contract did not specify texture.

CADC contends that Lovell's argument, that the evidence was insufficient to support the trial court's finding of breach on her part, fails to consider the facts presented at trial. Wheatley, whom the trial judge found to be the most credible witness, testified that the floor was not satisfactory for a kitchen because it would not hold up under hot grease and, with the

abuse of walking back and forth, it would only last a few months. He also testified that the floor had too many ridges to make it possible to squeegee water to the drain. He stated that the product used might be permissible to use in a kitchen if it were properly applied, but he believed that the application of the product here was the problem. He stated that he only used this product for decks and patios.

CADC also points out that Lovell admitted that she had not used ARDEX before using it on the floor at the Center. Lovell also stated that her finished product did not look anything like the floor at Rhea Men's Store in Benton, even though she was hired to install a floor to look like it. Pat Sanders, an environmental health specialist for the State, testified that a floor in a commercial-grade kitchen is to be smooth and easily cleanable and that a floor that you could not squeegee would be a problem. CADC argues that the evidence was that Lovell was to resurface a floor for a commercial-grade kitchen. Upon completion, CADC had to hire the job to be redone because the ridges in the floor did not make it possible to squeegee water off the floor. CADC contends that the ridges were due to misapplication of the product.

CADC submits that the evidence regarding the kitchen walls supports the trial court's findings. Lovell testified that the paint was like the example at the bottom of the board on Plaintiff's Exhibit 6, which was a demonstration board of the various types of paint applications. The example Lovell pointed to was that of the type of wall surface which was gritty and attracts dust and dirt over time. Also, Pat Sanders testified that the walls were not smooth and were chalky. She advised that the walls should be repainted, and they were.

CADC maintains, therefore, that the trial court's finding of a breach of contract is not clearly against the preponderance of the evidence. We so hold.

For her second point on appeal, Lovell contends that if she was not in breach of contract, as argued above, she should have been awarded damages for CADC's breach of contract for not paying her for the work she performed. Because we hold that the trial court was not in error in finding by a preponderance of the evidence that Lovell failed to perform under the contract, her argument that she is entitled to the final payment under the contract must also fail. Accordingly, the trial court's ruling is affirmed.

Affirmed.

VAUGHT and HUNT, JJ., agree.